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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

INTERNATIONAL SHOE COMPANY, PETITIONER,

vs.

FEDERAL TRADE COMMISSION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

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The International Shoe Company, a corporation, prays for a writ of certiorari to review a judgment of the Court of Appeals for the First Circuit, entered November 27, 1928, which affirmed an order of the Federal Trade Commission issued against the International Shoe Company under authority of Section 7 of the Clayton Anti-Trust Act (October 15, 1914; 38 Stat. 730) which provides:

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such

commerce in any section or community, or tend to create a monopoly of any line of commerce."

A. Statement of the Case

This case involves the right of one corporation to purchase the shares of another when, after prolonged and exhaustive efforts to avoid its dilemma, to which the purchasing corporation in no sense contributed, the selling corporation is faced with the choice of liquidation or sale. The Federal Trade Commission ordered the petitioner to divest itself of the shares so purchased, and to cease and desist from the ownership, operation and management of the properties represented by such shares. This order was affirmed by the Court of Appeals for the First Circuit.

Petitioner contends that the conditions which attended its purchase present no cause for denunciation under the Clayton Act, but, on the contrary, in their very nature avoid the dangers against which that act undertakes to protect the public. The facts are exhaustively presented in the record, to which more particular reference is made in the more detailed statement in the brief. There is no conflict in the testimony. Briefly given, the facts are essentially these:

Up to 1920 the business of manufacturing shoes was generally prosperous. There were about fifteen hundred such concerns in the United States. Among the largest were the parties to the transaction in question—one, the petitioner, International Shoe Company, a Delaware corporation, having outstanding preferred stock of the par value of $12,500,000.00, and 765,000 shares of common stock without par value, and of an actual value of approximately $28,000,000.00, with its chief offices in St. Louis, and with factories nearby in Missouri, Illinois and Kentucky, and its business chiefly in the West and South. The other,

the W. H. McElwain Company, having outstanding capital stock of the par value of about $14,000,000.00, and with chief offices in Boston, and factories in New Hampshire, and its principal sales territory east of Illinois and north of the Ohio river.

Apart from the general nature of their business, the two concerns sustained no relation to each other. Their products were essentially different. The McElwain Company manufactured only dress shoes for men and boys. The petitioner, on the other hand, manufactured a large variety, including shoes for women, children and misses; work shoes for men and boys and dress shoes for men but not for boys.

The petitioner's production of men's dress shoes—the one staple of the McElwain Company, constituted only four per cent of petitioner's output; and while in a geographic sense both concerns sometimes entered the same territory, the men's dress shoes made by them respectively appealed to different classes of customers.

About ninety-five per cent of petitioner's business was in towns having a population of six thousand or less; to this country trade it offered a strictly all-leather shoe in which durability was stressed rather than style or finish. Approximately ninety-five per cent of the McElwain Company's business was in cities having a population of ten thousand or more; it tendered a shoe, the selling potentiality of which was finish and appearance rather than durability or all-leather quality. The petitioner sold its product exclusively to small town retailers and invariably under its brands or marks. The McElwain Company sold its product to wholesalers, jobbers and large retailers and, when requested, stamped the shoes with the brand or mark of the purchaser. The course and method of the two concerns had no effect whatever upon each other's fortunes.

In the latter part of 1920 and early in 1921, the shoe manufacturing business in general suffered a serious depression; but the experience of the two concerns was precisely opposite. The International Shoe Company adopted a policy of caution. It had purchased materials conservatively and anticipated the coming depression by slightly lowering its prices. In the spring of 1921 it had orders greatly in excess of the capacity of its factories. There was not time to erect new factories. The W. H. McElwain Company, on the contrary, early in 1920, had contracted for an abundant stock of hides and other materials at peak prices. It could not afford to meet the decline which shortly came about. Its orders were cancelled to the extent of $7,000,000.00. In the course of a year (from May, 1920) a surplus of $3,888,440.00 was turned into a deficit of $4,382,136.00. About one-half of its factories were shut down. It owed approximately $15,000,000.00 to banks in New England, and about $2,000,000.00 on open account. Its paper was maturing, and the date (May 31) for publishing its financial statement (required under the laws of Massachusetts) was approaching. Every effort to secure extensions or new capital had been exhausted; and the conclusion was reached by the officers and their financial advisers that the choice was between a liquidation receivership and a sale.

Under these circumstances, about March, 1921, representatives of the McElwain Company came to St. Louis without notice to ask the International Shoe Company for aid. During March and April several conferences were held. In the several conferences discussion was confined solely to assets on the basis of sound value. When tentative agreement of their value was reached, it then became apparent that all McElwain's executives and shoe workers who held second

preferred and common stock would be "broke", as nothing would be left out of the value of the assets to apply to such stock. So the International Company agreed to buy all classes of stock for the value of the assets, paying 82½% for the first preferred, 75% for second preferred, and 50% for common. The aggregate of all stock at these figures was the agreed value of assets. The avowed purpose was to satisfy all debts, to avoid the serious consequences of a crash, to secure enough to the stockholding members of the McElwain Company organization to retain their active interest in reviving the failing concern, and for the International Shoe Company to have sufficient factories to meet its requirements. The International Shoe Company had no organization in New England, and was in no position to man this added enterprise from St. Louis. The contract called for the delivery of all shares and there was no restriction against shareholders of the McElwain Company re-entering the business of manufacturing shoes, as several of them later did. A small amount of stock failed to come in. The rest came in promptly upon the disclosure by officers of the McElwain Company that, in case of a receivership, the debts might not be paid and, at best, the first preferred would receive only a small percentage of par.

Upon the consummation of the sale in May, 1921, the International Shoe Company broadly advertised the transaction, particularly in the East. It at once sold some of the distributing branches of the McElwain Company to the managers of such branches; it tried to sell the others, and after failing to do so, closed them to save further loss. It sold the shoes on hand as rapidly as possible; it endeavored to collect accounts; it operated all factories giving work to all old employes and maintaining the full wage scale.

But it became necessary for the International Shoe Company to advance, between May 11 and November 30, 1921, $11,850,000.00 to pay the maturing debts of the McElwain Company, which could not have been satisfied otherwise without a sale of the McElwain factories.

Petitioner sold the McElwain shoes on hand, the orders for which had been cancelled, as best it could. Some of these shoes it sold to its own customers, but only after a full explanation as to the origin and qualities of the shoes. It used the newly acquired factories in large part to manufacture its own kind of shoes to meet its particular needs. Throughout the purchasing company treated the property of the selling company as part of its own system, although the paper organization of the latter was retained until some time in June, 1923.

On May 18, 1923, two years after the purchase, all the facts having been public property during the intervening period, the Federal Trade Commission filed its complaint.

Proceedings Before the Commission and in the Court of Appeals.

(1) The Complaint of the Commission.

On May 18, 1923, the Commission filed its complaint (R. 29) charging that in 1921 the petitioner was engaged in "manufacturing shoes for men, women, boys, children and infants and in selling *such* shoes" in interstate commerce "in competition with other persons, firms and corporations similarly engaged"; that the W. H. McElwain Company was manufacturing "shoes for men and boys" and was engaged "in the business of selling *such* shoes" in interstate commerce "in com-

petition with other persons, firms and corporations similarly engaged"; that the two corporations were "in competition with each other in the shoe business as hereinabove described"; that while the two concerns were "in competition with each other, as aforesaid," the petitioner acquired the stock of the McElwain Company; that the effect of the acquisition was to substantially lessen competition between the two corporations; to "restrain commerce in the shoe business"; to tend to create in petitioner "a monopoly in interstate commerce in the shoe business".

The complaint does not charge what was the approximate volume of business done periodically by either concern; what quantity, quality or variety of shoes, or at what range of prices, were sold by either; with respect to what kind of shoes there was competition; under what circumstances petitioner acquired the stock; what was the object, purpose and intent of either purchaser or seller; in what respect or degree, and as to what class of shoes, the stock acquisition restrained commerce; in what manner and to what extent the stock acquisition had a tendency to create an unlawful monopoly in petitioner.

(2) The Answer.

By its answer (R. 32) filed July 3, 1923, the petitioner denied the existence of competition; admitted the purchase of all the stock and the acquisition of substantially all of it, denied violation of Section 7 of the Clayton Act, and alleged that after the complaint was filed it had disposed of the shares of stock.

(3 The Hearing Before the Commission.

On the hearing before the Commission it was shown by the evidence— (1) that there never had been

substantial competition between the two corporations; (2) that at the date of stock acquisition (May 11, 1921) the McElwain Company was insolvent; that is to say, unable to pay its debts as they became due, and unable to procure new capital or extensions, and hence, in contemplation of law, its competition, whether with petitioner or with others, had ceased; (3) that a large portion of the stores had been sold, and that others had been closed; that all factories had been reopened, and that all the property of the old McElwain Company still retained was operated as a part of petitioner's business; (4) that 6000 operatives were given employment, the full wage was maintained, and the price of shoes was lowered.

(4) The Findings and Order of the Commission.

The Commission made an elaborate written report (R. 499-523) in which (a bare majority concurring) it found that (R. 502) "on and prior to May 11, 1921" * * * "the competition in commerce between the two companies was substantial"; that (R. 512) the effect of the acquisition was (a) to substantially lessen competition between the two concerns "in the sale of dress shoes for men"; (b) to restrain commerce in the sale of such shoes. The charge that the acquisition had a tendency to create in petitioner a monopoly in the shoe business was dropped and is out of the case. As to the defense based upon the insolvent condition of the McElwain Company, the Commission found that (R. 512-3) at the date of the stock acquisition the McElwain Company was not insolvent within the meaning of the National Bankruptcy Act.

By its order (R. 523), the effective date of which is May 7, 1927 (R. 541), the Commission called upon the petitioner to divest itself of the stock of the McElwain Company and to cease and desist from the

ownership, operation and management of the properties formerly owned by the McElwain Company.

Commissioners Hunt and Humphrey dissented. Commissioner Humphrey filed a memorandum of dissent, concurred in by Commissioner Hunt, which is in part as follows:

"In this case the evidence shows the following facts:

1. That the respondent acquired the stock of the McElwain Company.

2. That the respondent and the McElwain Company at the time were in competition. Whether such competition was material, is a matter of opinion.

3. That the McElwain Company initiated the transaction.

4. That at the time of the transaction the McElwain Company was in a failing financial condition, or at least its officers believed that it was, and they believed that its bankruptcy was probable.

5. That the respondent at the time had taken more orders than it was able to fill, at its then capacity, and was considerably troubled with these excess orders, and was very desirous, for this reason, of increasing production.

6. That it used the organization and assets acquired from the McElwain Company in increasing its output, largely for the purpose of filling these excess orders.

7. That the respondent did not increase prices; on the contrary, in some instances, it voluntarily decreased prices.

8. That it made better shoes, and sold them for the same or less money than the McElwain Company was selling the same class of shoes at the time the respondent acquired its stock.

9. That the respondent did not use the stock so acquired by voting or otherwise to bring about, or attempting to bring about, the substantial lessening of competition.

10. That the public was in no degree, in any

way, injured by the transaction. On the contrary, the evidence shows that the public was benefited thereby.

QUESTIONS OF LAW

Admitting, but not asserting, that there was substantial competition between the respondent and the McElwain Company at the time of the transaction complained of, it was probable that this competition was going to be destroyed by the failure of the McElwain Company. This circumstance removed the very evil that the statute was intended to prevent. This being true, the transaction was not unlawful. (*American Press Association v. United States,* 245 Fed. 91)." (R. 525-6).

* * * * *

"Had the respondent been content to wait, if we are to be guided by the evidence, then in a short time its competitor would have been bankrupt. The stockholders would have lost their entire investments. A great organization would have been destroyed and the competition with which the respondent is charged with destroying would have been wiped out without cost to the respondent of a dollar.

In this case, the commission has given warning to the business world that no one must answer the cry of distress. If they do, and save a vessel from complete wreck, no matter what the effect may be upon the public, they will be condemned and must suffer the penalty. But it will be perfectly proper and commendable to stand by until the vessel sinks, and its competition with them is thereby entirely destroyed, and then pick up whatever flotsam and jetsam they may, but under no circumstances must the vessel be saved, however much it may be to the public interest. I think such policy must inevitably injure the public and be immeasurably detrimental to our industries.

I can not be oblivious to the fact that by the

issuance of this order many innocent investors will be injured and that no one will be benefited." (R. 527.)

In its efforts to show the Commission that its order could not be complied with, petitioner finally moved the Commission for leave to take further testimony (R. 34), and to have it modify its order. To that end petitioner alleged and offered to prove that the properties formerly belonging to the McElwain Company can not be sold for any reasonable price to a responsible purchaser who can and will continue the production of shoes; that without the capital, merchandise orders and trade supervision of the petitioner, investors can not be induced to embark capital in the business formerly conducted by the McElwain Company. The Commission ignored the motion and the offer of proof.

(5) The Decision by the Court of Appeals.

On March 3, 1928, petitioner filed its petition (R. 1) to have the order of the Commission reviewed and set aside. It specifically alleged the insufficiency of the complaint (R.15), the undisputed proof of the insolvency of the McElwain Company (R. 17), and the positive proof that there was no substantial competition between the two concerns (R. 21).

Petitioner further filed a motion (R. 709) to have the Court of Appeals adjudge the complaint insufficient. The Court denied the motion without comment on the day that it was argued (R. 735). The case was heard on the merits October 4 and 5, 1928, and on November 27, 1928 (R. 735) the Court of Appeals affirmed the order of the Commission, holding that there was substantial competition between the two corporations, and that the McElwain Company was not insolvent (applying the bankruptcy definition of insolvency).

Throughout the inquiry as to whether there was substantial competition between the two corporations, both the Commission and the Court of Appeals ignore the fact that the McElwain Company was unable to pay its debts as they became due; and that, apart from its financial embarrassment, it was, under the law of Massachusetts, insolvent.

Both Commission and Court predicate the unlawfulness of the stock acquisition on the finding that the book value of the McElwain Company's total assets exceeded the amount of its debts and hence, within the definition of the National Bankruptcy Act, it was not insolvent.

The test and legal consequences of insolvency as established by the law of Massachusetts and recognized by common experience, are disregarded; and they base petitioners' liability solely on the insolvency definition of the Bankruptcy Act. It is always for the Court to inqure whether facts found by an administrative commission and made conclusive by statute are supported by substantial testimony. In this case, however, the Court adopts the Commission's report without inquiry whether there was testimony to sustain the finding of substantial competition before the sale, or capacity for any competition then or thereafter. Beyond that, the Court indulges in suggestions of what might have been done to save the McElwain Company, which suggestions are shown by all witnesses to have been impossible of realization; and all of which are refuted by the testimony of all parties in interest, whose primary concern it was to make the best of a desperate situation.

B. Reasons Relied on for the Issuance of the Writ.

(1) The complaint does not allege facts sufficient to constitute a violation of Section 7 of the Clayton

Act. Without such complaint, the Commission has no jurisdiction. *Fed Trade Com. v. Gratz* (1920) 253 U. S. 421.

(2) This Court has heretofore held that in a proceeding of this nature, the respondent shall not be condemned upon mere inferences; and in this case the findings as to substantial competition between the two companies, as to the solvency of the McElwain Company, and as to the reasons for acquisition in the form of a stock purchase, are pure inferences which are contradicted by the undisputed testimony of all the witnesses.

> "Manifestly, the Court must inquire whether the Commission's findings of fact are supported by evidence."
>
> *Fed. Trade Com. v. Curtis Pub. Co.*, 260 U. S., at page 580.

(3) There was no substantial competition between the two corporations at the date of the transaction.

(4) At the time of the sale the McElwain Company's only alternatives were liquidation or sale. Upon its own showing its debts could have been paid only by a sale of its factories, and further competition with any one was therefore entirely eliminated.

(5) Technical insolvency was not the test. The question was one of practical relief for stockholders and creditors from impending disaster. The step taken provided the only practical measure for such relief.

(6) If the legal definition of insolvency is to govern, the bankruptcy act is not the test. The Massachusetts law determined the rights, interests and the fate of the McElwain Company, and the imperative

provisions of that law only accentuated the recognized financial dilemma of the company.

(7) In holding that it was unlawful for the petitioner to acquire the stock of the McElwain Company under the circumstances so given, the Court of Appeals has greatly enlarged the scope of Section 7, and is in direct conflict with the interpretation given that section by this Court, in that phase of the *Fed. Trade Com. v. Thatcher Mfg. Co.*, 272 U. S. 560, which deals with the acquisition of the share capital of Woodbury Glass Co.

The decision is also in conflict with the principles announced by this Court, in *United States v. United States Steel Corp.* (1920), 251 U. S. 417, and by the Court of Appeals for the Seventh Circuit, in *American Press Assn. v. United States* (1917), 245 Fed. 91, both construing the Sherman Anti-Trust Act.

(8) The evidence shows that the transaction between the two corporations though in form a stock purchase was in substance a purchase of assets. The purpose of petitioner was to acquire additional facilities for its production. Its orders exceeded its capacity, and the products of the acquired factories were sold to satisfy its requirements. Production and sales were increased, wages were maintained, prices of shoes were lowered, and it is submitted the purchase under such circumstances was not a violation of the provisions of the Clayton Act.

> "The act by express terms says that Section 7 does not apply to a corporation purchasing such stock * * * and not using the same to bring about, or in attempting to bring about, the substantial lessening of competition."
>
> *Fed. Trade Com. v Thatcher Mfg. Co.*, 5 Fed. 2d p. 622, par. 6-7; which case was affirmed by this Court; 272 U. S. 560.

(9) It is of great importance to the business interests of this country to have this Court decide whether or not Section 7 of the Clayton Act forbids a failing concern to salvage its assets through the medium of a sale of its stock, with no consequences inimical to the public interest. It is a question of first impression.

(10) The decision of the Circuit Court of Appeals in this case is of such importance as to call for the exercise of this Court's power of supervision and determination of the law upon the subject.

(11) The Commission's complaint is aimed solely at petitioner's failure to observe a purely technical procedure. That pursuit is futile, because petitioner has now technically consummated what had been virtually done before. The order to sell assets is impossible of fulfillment because they have been absorbed, and because no responsible purchaser will take them subject to the debts which petitioner now controls.

Wherefore it is respectfully submitted that the writ of certiorari should issue as prayed.

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I

THE OPINION OF THE COURT BELOW

The opinion of the Court of Appeals is reported in 29 Fed. (2d), 518.

II

JURISDICTION

Petitioner filed a petition in the Court of Appeals for the First Circuit to review an order of the Federal Trade Commission based upon a finding of a violation of Section 7 of the Clayton Anti-Trust Act (38 Stat. 730). The jurisdiction of the court below was invoked under the authority of Section 11 of the

Act. The Court of Appeals affirmed the order of the Commission on November 27, 1928 (R. 735).

The jurisdiction of this Court is invoked under Section 11 (paragraph 5) and under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, which now is Section 347, title 28 U. S. C. (*Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554)

III

Statement of the Facts

(1) The McElwain Company, and its Financial Predicament in 1921.

The W. H. McElwain Company was a Massachusetts corporation with its principal place of business in Boston. It had outstanding capital stock of the par value of approximately $14,000,000 (R. 250). Its shoe factories, situated in New Hampshire, had a capacity of about 38,000 pairs per day (R. 449). It produced only dress shoes for men and boys (R. 215).

In 1920 there was an abrupt decline in the price of leather products which caused the Company heavy inventory losses and rendered its finished shoes unmarketable at profitable prices.

The changed situation is made clear by comparing conditions in 1920 and 1921 with respect to (a) production, (b) sales and (c) working capital.

(a) The production (stated in pairs) during the first five calendar months was as follows (Rec. 687; Ex. No. 39):

1920	1921	Decrease	% Decrease
3,230,347	932,497	2,297,850	71%

(b) The volume of sales during the first five calendar months was as follows (Rec. 687; Ex. No. 40):

1920	1921	Decrease	% Decrease
$16,246,941	$3,794,522	$12,452,419	76%

(c) The progressive depletion of its working capital as shown by the balance sheets for May 30, 1920 (R. 655), February 28, 1921 (R. 645), April 30, 1921 (R. 612), May 31, 1921 (R. 656) and November 30, 1921 (R. 657), is here indicated:

	Current Assets	Current Liabilities	Working Capital
May 30, 1920	$26,191,649.45	$12,687,728.82	$13,503,920.63
Feb. 28, 1921	26,894.457.41	17,330,596.89	9,563,860.52
Apr. 30, 1921	21,448,783.64	17,177,349.25	4,271,434.39
May 31, 1921	19,403,715.88	15,880,901.42	3,522,814.46
Nov. 30, 1921	12,735,599.14	13,701,494.37 (Deficit)	965,895.23

On May 30, 1920 (R. 655) the balance sheet shows a surplus of $3,888,440.73; on April 30, 1921 (R. 612-3), there is a deficit of $3,425,217.23—a loss in condition during 11 months of $7,313,657.96.

The balance sheet for April 30, 1921 (R. 612), shows current assets of $21,448,783.64, but of this amount $10,275,521.43 included the inventory value of shoes for which there was no sale—customers had cancelled orders to the extent of $7,000,000, and $8,-028,082.41 represented customers accounts, and it had cash on hand of $2,172,345.16. On April 30, 1921, the company owed in current accounts $1,958,349.25, and in unsecured notes held by the banks in New England $15,219,000—a total current indebtedness of $17,-177,349.25 (R. 612).

Mr. Stanley King testified (R. 287): "The financial condition of the W. H. McElwain Company at that time [i.e. April 5, 1921] was practically insolvent and in my opinion at that time, which I still hold, the company would have been actually insolvent upon the publication of those figures".

Mr. Rand, referring to what took place at the final

conference before the contract of purchase was agreed upon, said (R. 90): "We discussed and discussed that [i.e. the financial condition of the McElwain Company] with Mr. King and Mr. McElwain and all of us were conscious of the fact that the company in this financial condition, with a liability on April 30th of $17,177,000 could not keep its doors open 30 days longer".

Mr. Johnson testified that, at the conclusion of a conference in Boston in the latter part of April, he told the executives of the McElwain Company that they were "broke" (R. 153).

Mr. Dwinnell testified (R. 341) that in his opinion the purchase by the petitioner resulted in the payment of $15,000,000, or $16,000,000 worth of debts which would not otherwise have been paid.

Mr. Gray, auditor of the International Shoe Company, testified (R. 199) that between May and November 30, 1921, the petitioner advanced to the McElwain Company $11,850,000, which advances alone prevented the actual liquidation of the Company.

The cause of this state of affairs and its consequence to the business was stated by the President of the McElwain Company in a letter to the stockholders under date of May 24, 1921, recommending the sale of the stock to the petitioner (R. 562-3):

> "Your Company has suffered a severe setback during the last few months, owing to a cessation of buying, an unparalleled wave of cancellations and an unprecedented slump in leather values.
>
> "In the Spring of 1920 our total factory capacity was oversold twenty-five per cent. to December 1, 1920. To cover these sales we protected ourselves by the purchase of hides only to the extent that seemed prudent.
>
> "But beginning in August cancellations and returns began to come in until within a comparatively short time they amounted to over $7,000,-

000. New orders also became practically unobtainable. Meanwhile our merchandise on hand consisting of manufactured shoes awaiting delivery dates, merchandise in process in our shoe factories and tanneries and raw hides dropped in value day by day. Sole leather hides fell to one-fourth of their previous value and upper leather hides to one-third of their value as of July 1st.

"We have just taken within the fortnight a special interim inventory reducing all raw, in-process and finished merchandise to sound value as of today. We find losses for the current year of $6,472,000. We also find that due to these inventory losses and factory losses, to the payment to the Government of $1,000,000 in Income and Excess Profits Taxes, additions to plant, retirement of preferred stock, dividends paid during earlier months of the year, and several other similar items, our working quick capital has been seriously reduced.

"While our banks have not yet restricted our credits, we realize that it is not the function of the banks to supply permanent working capital and that the duty and necessity has rested upon us to reduce our bank loans as rapidly as possible until they come within the compass of our reduced resources.

"But with the liquidation completed it became clear that our restricted working capital and our reduced bank accommodations held out no practical opportunity to operate our factories or to conduct our business on a sufficient scale to afford reasonable expectation of profit."

The situation necessitated prompt action. The Company's fiscal year ended May 31 (R. 286). The Massachusetts statutes (Generals Laws 1921, Chap. 156, sec. 46) require of business corporations "a report of condition which shall be signed and sworn to by its president, treasurer and a majority of its board of directors." This must be filed within 30 days

after the date of the annual meeting or the final adjournment thereof. When filed it is open to public inspection. Here the report for 1921 contrasted with that for the year preceding, would have exhibited these changes:

	Excess of current assets over current liabilities	
May 31, 1920	$13,500,000	(R. 655)
May 31, 1921	3,593,000	(R. 656)
Loss on operations for the year	$ 9,907,000	
	Profit and Loss	
May 31, 1920—Surplus	$3,888,440	(R. 655)
May 31, 1921—Deficit	4,382,136	(R. 656)
Loss in condition	$8,270,576	

The officers and directors struggled with the situation almost daily during the early months of 1921 (R. 285). The President of the Company, Mr. J. F. McElwain, discussed the condition at length with Mr. C. H. Dwinnell, Vice President of the First National Bank of Boston, which held the Company's notes in the amount of $1,000,000 (R. 339-341). That bank was unwilling to grant an extension (R. 343).

The other notes were held by 23 national banks of deposit, and 44 savings banks, and $2,500,000 had been discounted by note brokers to purchasers whose identity is not shown (R. 285). Because of the great number of banks holding the notes and the necessity for quick action, it was impossible to obtain an extension (R. 340). Mr. McElwain attempted to enlist new capital through Lee, Higginson & Co., but was unsuccessful (R. 339-40). In the final analysis the alternatives were a receivership or sale of the business (R. 340).

Early in March the directors authorized two of their number, Messrs. McElwain and King, to open negotiations with petitioner (R. 287-8), as the only possible purchaser in the United States. Up to this time there had been no connection between the two companies and the officers and directors of the petitioner had no knowledge of the foregoing facts respecting the McElwain's Company's financial condition (R. 148).

(2) The International Shoe Company

The petitioner is a Delaware corporation, with its principal place of business in St. Louis. In 1921 it had outstanding preferred stock of the aggregate par value of $12,250,000 and 765,000 shares of common stock without par value (R. 572) and of the actual value of $30 per share (R. 564). It owned and operated 32 shoe factories all in the states of Missouri, Illinois and Kentucky with a total daily capacity of about 70,000 pairs (R. 500), but its production of dress shoes for men—the only kind of which complaint is made in this proceeding—did not exceed 3,000 pairs daily (R. 450).

In the spring of 1921 its trade position was the antithesis of that of the McElwain Company. It had no unpaid indebtedness in the form of notes or bonds; its credit and capital resources were more than sufficient to meet its requirements. Further, it had on its books orders for shoes greatly in excess of its capacity to produce; in the period from January 1 to May 31, 1921, it or its customers cancelled orders to the extent of $11,395,000 (R. 156, 7) owing to its inability to make prompt deliveries. It had an urgent need for an immediate expansion in its production. Mr. Rand, President of the Company, testified (R. 49) that it required approximately two and one-half or three

years to build a new factory, and bring it to an orderly process of production.

There Was No Substantial Competition.

The only witnesses who were examined as to competition testified positively, and without contradiction, that there was no substantial competition.

Mr. Rand, President of the International Shoe Company, said (R. 68): "I cannot recall of an instance in which we had McElwain shoes called to our attention in a competitive way, from the standpoint of price or quality".

Mr. Johnson, Chairman of the Board, testified to the same effect (R. 160-1).

In the letter of President McElwain to the stockholders of the McElwain Company (R. 564), quoted above, it is said: "They [i.e. petitioner] have sought primarily to distribute their products in the great agricultural and mining districts of the country; we enjoy a large business from retailers in large cities. Separately there has been little conflict in our respective fields of activity; we compete only on the fringe".

Mr. Johnson testified (R. 166) that 95% of petitioner's sales were made in small towns; "from the cross-road store up to towns of five or six thousand". Over 95% of the McElwain Company's sales were in cities having a population of over 10,000 (R. 704; Ex. 47).

The trade policies of the two concerns were directly contrary to each other. The petitioner sold exclusively to retailers under its own brands (R. 50); while the McElwain Company sold largely to jobbers and wholesalers (R. 666-7; Ex. 37), and, whenever requested so to do, placed the name of the customer on the shoes (R. 283). The petitioner's refusal to follow this practice prevented it from securing the custom of the large retailers (R. 161).

During the year preceding May, 1921, the McElwain Company sold shoes to about 600 retail dealers (R. 670; Ex. 37), while the petitioner had as customers 78,242 retailers (R. 504; Finding Eight). And during the period petitioner's total sales of men's dress shoes to retailers on the McElwain list was 52 5/12 dozen pairs (R. 434).

(3) The Negotiations Leading to the Stock Transfer

In the latter part of March, and while Mr. Rand, president of petitioner, was in Mexico, Messrs. McElwain and King, without previous notification, arrived in St. Louis and opened negotiations (R. 147-8). After preliminary conferences which covered a period of 30 days were out of the way, the foregoing condition was revealed, and the officers of the petitioner were satisfied that the McElwain Company was "broke" (R. 153).

The representatives of the McElwain Company urged the petitioner to purchase the assets at their real value without reference to shares of stock or the indebtedness (R. 90). The petitioner refused to do this, on the ground that it would have impoverished the holders of the common stock, which group included the active managers of the Company's business (R. 89). In President McElwain's letter to the stockholders (R. 564-5), quoted above, he said: "The International Shoe Company have not been willing to make an offer to purchase outright the assets of our Company, but they have said that if they could maintain the continuity and the goodwill and the management of our Company, which they felt could be assured only by the purchase of our three classes of stock, they would be willing to do so but upon no other basis would they consider an amalgamation of the interest of the two companies."

(4) The Stock Acquisition Contract

The net value of the assets was agreed upon as being $9,470,832.50 (R. 620). This was then commuted into the price of shares of stock (R. 92), so that the aggregate sum for all the shares would equal the agreed value of the assets. By the contract executed May 11, 1921 (R. 616) the directors of the McElwain Company agreed to sell their shares and to procure the sale of the remaining shares, and the petitioner agreed to purchase all the outstanding shares, at the respective prices named, and pay therefor in cash or in shares of the International Shoe Company at the seller's option. The contract imposed no restraint upon the freedom of the sellers to re-enter the business, and the record shows (R. 536) that several former principal executives of the McElwain Company re-entered the shoe business in New England before the complaint was filed.

IV.

Specification of Errors.

It is submitted that the Court below erred:

(1) In failing to sustain petitioner's motion to dismiss the proceeding because of the insufficiency of the Commission's complaint.

(2) In holding that there was substantial competition between the two corporations at the date of the stock acquisition.

(3) In failing to hold that, in contemplation of law, the insolvency of the McElwain Company put an end to its ability to compete with any one.

(4) In finding that the McElwain Company was in fact capable of continuing business; the conclusion rests entirely upon supposition.

(5) In applying the Bankruptcy Act definition of insolvency as decisive of the case and ignoring the definition of insolvency as established by the law of Massachusetts.

(6) In failing to hold that Section 7 of the Clayton Act has no application to the acquisition by one corporation of the stock of an insolvent corporation, where, on the part of the seller, the transaction is the only escape from liquidation.

(7) In disregarding throughout the decisive facts, the object, intent and purpose of both seller and purchaser, and the actual effect of the transaction on the shoe industry, and in substituting therefor inferences not supported by the evidence.

(8) In disregarding controlling decisions of this Court and of the Circuit Court of Appeals, construing the Clayton Anti-Trust Act.

V.

THE ARGUMENT.

Summary of Argument

(1) The complaint is insufficient. If for its vague conclusions, a statement of the facts that induced the transaction is substituted, it is obvious there was no grievance to be corrected.

(2) The Circuit Court of Appeals affirmed the order of the Federal Trade Commission on the erroneous theory that its findings, even though drawn from inferences and not evidence, were binding on the Court and it could not examine the evidence and determine that the evidence did not support such findings and justify the order of the Commission.

(3) There is no evidence of substantial competition

at the time of the transaction, hence no basis for the order.

(4) The evidence is conclusive that the financial condition of the McElwain Company at the time of the transaction was such it had to sell or liquidate, hence its activities in the shoe manufacture were ended.

(5) Disregarding the fact of insolvency and insolvency as defined by the law of Massachusetts and resorting to the Bankruptcy Act definition of insolvency, is all that gives color to the finding of substantial competition. The condemnation of petitioner is grounded upon the Bankruptcy Act test; that test is irrelevant to the proceeding.

(6) The transaction as made was the acquisition of the assets of the McElwain Company as a part of the organization of the International Shoe Company. The stock purchase was to save the business, the executives and the operators,—not to lessen competition or restrain commerce.

(7) The Commission's grievance is confined to the form of the transaction, which otherwise is admitted to be free from challenge. No action was taken for two years after the widely heralded absorption of the McElwain assets, during which period petitioner advanced $11,000,000 to discharge the debts and keep the properties going. The Commission then filed its complaint because the petitioner acquired its equity in the debt burdened assets in the form of stock certificates instead of a bill of sale. The objection is a pure technicality.

1. The Complaint Is Insufficient.

The requisites of a complaint by the Commission when proceeding under authority of the Clayton Act are the same as when it proceeds under the Federal

Trade Commission Act. Paragraph 2 of Section 11 of the Clayton Act (prescribing the essentials of a complaint) is a rescript of Paragraph 3 of Section 5 of the Federal Trade Commission Act. In *Federal Trade Commission v. Gratz*, 253 U. S. 421, which was a proceeding under the Federal Trade Commission Act charging "unfair competition", this Court held the complaint insufficient and declined to review the evidence on which the Commission and the Court of Appeals had acted. The Court said (page 427):

> "If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words, there is no foundation for an order to desist,—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the court."

Section 7 only prohibits stock acquisition "*where* the effect may be" to substantially lessen competition, restrain trade or tend to create a monopoly. Here the complaint fails to state facts which, if proved as laid, would empower the court to find that the forbidden effect was accomplished.

2. The Court of Appeals, in holding its jurisdiction did not permit it to go behind the findings of the Commission based on inferences (contradicted by evidence and not justified thereby) has overlooked its province and duty as stated by this Court in *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S., at page 580 where it says:

> "Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive. But, as the statute grants jurisdiction to make and enter, upon the pleadings, testimony, and proceed-

> ings, a decree affirming, modifying, or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented, and whether there are material facts not reported by the commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be, remanded to the commission,—the primary fact-finding body,—with direction to make additional findings; but if, from all the circumstances, it clearly appears that, in the interest of justice, the controversy should be decided without further delay, the court has full power under the statute so to do. The language of the statute is broad, and confers power of review not found in the Interstate Commerce Act."

3. THERE WAS NO SUBSTANTIAL COMPETITION.

As to the alleged competition the Commission's Finding (R. 502), which is quoted and approved by the Court of Appeals without any analysis of the testimony, is an inference which is wholly unwarranted by the undisputed facts.

The finding is that the petitioner sold men's dress shoes "*similar in style,* comparable in price and *equal or superior in quality* to the men's high and low dress shoes produced by the McElwain Company". And "both companies made and sold *medium priced dress shoes* and sold such shoes to retail dealers *in the same States, and in many of the same cities* and towns, and *in some instances to the same dealers*". All these generalities are consistent with the absence of substantial competition and altogether insufficient to show it. The only witnesses who were examined as to competition testified positively and without contradiction that there was no substantial competition.

The record shows that by "similar in style" is meant that both concerns made high shoes and low cuts (R.

330). With respect to quality Mr. Johnson was asked (R. 171) if the men's dress shoes of the petitioner "were just as good as those shoes made and sold by the W. H. McElwain Company". His answer was: "I think they were better, *that is from the standpoint of service,* but the unfortunate part of it is we could never convince the retailer who catered to city or dressy wear, we could not convince him of that fact,—the fact that our company travelled five hundred men and we were able to sell only three thousand pairs a day and that would be a maximum I think of our Patriot shoe".

Substantial competition is a fact, susceptible of direct proof;—it does not rest on inferences. The fact that two manufacturers make men's dress shoes, one as its sole product, the other a small part of its output;—where the shoes are differently constructed and sold to different classes of customers, largely in different classes of towns, does not prove competition, even though 16 merchants in the United States purchase shoes from both manufacturers.

Both the Commission and the Court of Appeals ignore this testimony and these facts which are undisputed.

4. Insolvency of the McElwain Company.

Moreover, both tribunals take the course of the McElwain Company's business when it was solvent as the basis for the inference of substantial competition after it was insolvent; they completely ignore the change that came about from May, 1920, to May, 1921.

As to the financial condition of the McElwain Company, neither the Commission nor the Court of Appeals controverts the facts as summarized above; but in spite thereof, both find that in May, 1921, the Company was not insolvent within the meaning of the Bankruptcy Act.

Thus in its Findings (Paragraph 24; R. 512-3) the Commission takes the book value of all the assets (including real estate and plants at approximately $5,000,000) shown on the balance sheets and deducts therefrom the current indebtedness and concludes that "the property of the W. H. McElwain Company" * * * "exceeded its debts by" the amount of the remainder. Summarizing the computations thus made the Finding concludes with this: "At and prior to the acquisition by respondent [i. e. petitioner here] of the stock or share capital of the W. H. McElwain Company the aggregate of the property of W. H. McElwain Company, at a fair valuation, was more than sufficient in amount to pay its debts. W. H. McElwain was not insolvent prior to the acquisition of its stock or share capital by the respondent, nor subsequent thereto".

Affirming this, the Court of Appeals says: "The Commission expressly found that the McElwain Company was not insolvent within the Bankruptcy Act definition. Plainly it was not".

Both tribunals make this negative finding decisive. However, the Company's business activity was circumscribed by the law of Massachusetts and by that law the Company's inability to pay its debts as they became due subjected it to involuntary liquidation proceedings for the benefit of creditors, whether it was insolvent within the meaning of the Bankruptcy Act or not.

For several decades the courts of Massachusetts have held that a trader is insolvent who either has ceased to pay his debts in the ordinary course or cannot pay his debts as they become due. *Thompson v. Thompson* (1849), 4 Cush. 127, 134; *Lee v. Kilburn* (1854), 3 Gray, 594, 600; *Vennard v. McConnell* (1866), 11 Allen, 555, 561; *Peabody v. Knapp* (1891), 153 Mass. 242, 244; *Holbrook v. International Trust Co.* (1915), 220 Mass. 150, 155; *Steele v. Commissioner of Banks* (1922), 240

Mass. 394, 397. And this definition was enacted as a part of the law of sales of personal property. The statutory definition is as follows (General Laws 1921, Chap. 106, sec. 65 (3)): "A person is insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not".

This Court has held that the two definitions of insolvency, viz. of the Bankruptcy Act and that by the law of Massachusetts, import different meanings and that each obtains within the realm of the authority enacting it. *United States v. Oklahoma*, 261 U. S. 253, 261.

Neither tribunal mentions the law of Massachusetts; neither denies the inability of the Company to pay its debts as they became due, neither tribunal explains how the Company's debts could have been paid without the sale of its factories and the discontinuance of the business.

The Commission does not attempt to suggest how the Company could have continued its business, but the Court of Appeals say there were "several alternatives", of which three are stated:

> "(a) The McElwain Company's bank creditors might have carried the concern, just as at that time the banks were carrying a very large percentage of the business concerns in this community. It was a period of 'frozen credits', a time when there was practically a conceded moratorium to a large share of our business concerns, which competed fiercely for rehabilitating trade.
>
> (b) If a receivership had been found a necessary expedient, competition under receivership management would have been likely to be intensified, not eliminated.
>
> (c) In case of actual bankruptcy, the holders of

the preferred stock (one or both classes) would in their own interest have taken over the property, kept it in active operation and therefore in competition."

Each alternative stated by the Court presupposes the inability of the Company to pay its debts as they became due; and the tenability of each alternative is tested by the facts shown of record.

As to (a) the First National Bank of Boston, holding the Company's notes in the amount of $1,000,000, was unwilling to renew or extend them (R. 343). While the representatives of the other banks did not testify, no doubt the banks were in accord on the matter, for in the President's letter to the shareholders (R. 564), quoted above, he said: "While our banks have not yet restricted our credits, we realize that it is not the function of the banks to supply permanent working capital and that the duty and the necessity has rested upon us to reduce our bank loans as rapidly as possible until they come within the compass of our reduced resources". That the banks exacted payment shortly is indicated by the balance sheet for November 30, 1921 (R. 657), which shows advances by the petitioner of $11,000,000 and a reduction of $13,000,00 in the debts since May 31 (R. 656).

As to (b) it is not suggested how "receivership management" could have "intensified" competition. In order to compete, the shoes must be produced and sold at a profit, otherwise losses mount still higher.

To the McElwain officials, who were capable, experienced and deeply interested, the situation "held out no practical opportunity to operate our factories or to conduct our business on a sufficient scale to afford a reasonable expectation of profit" (R. 654; letter to stockholders quoted above).

As to (c) the record shows that throughout the negotiations the First Preferred stockholders were repre-

sented by Mr. James J. Storrow of Lee, Higginson & Co. (R. 293). Beneath the signature of the petitioner and the McElwain directors to the contract of purchase (R. 619) is this:

> "We approve of the above agreement and agree to use our best efforts to secure the acceptance of it by the holders of the First Preferred stock of W. H. McElwain Company.
>
> Lee Higginson & Co."

The second preferred shares were held by the directors who signed the contract and by the employees of the Company.

All the alternatives imagined by the Court of Appeals, and perhaps others, are envisaged in the letter to the stockholders (R. 564) quoted above: "In these circumstances your officers and directors have studied various plans of securing additional capital, all of which have been carefully weighed and analyzed with Messrs. Lee Higginson & Co. and in conference with our banks".

And all three alternatives can be measured by the actual experience of the business as conducted by petitioner. It "carried" the McElwain Company, it paid the indebtedness; it took over the property and "kept it in active operation", with the result that from May 31, 1921 (R. 656) to November 30, 1921 (R. 657) the operating capital of $3,522,814.46 completely disappeared from the balance sheet and the deficit of $4,382,-136.70 was increased to the sum of $9,103,076.59.

The experience of the International Shoe Company shows that the McElwain Company's business when operated could not pay its debts.

5. The Transaction Did Not Lessen Competition or Restrain Trade.

The decision of the Court of Appeals is in conflict with a ruling of this Court in *Thatcher Manufacturing*

Company v. Federal Trade Commission, 272 U. S. 554.

That was a proceeding under Section 7 of the Clayton Act, charging the Thatcher Company with unlawful acquisition of the stock of several corporations, among which was the Woodbury Glass Company. The Court of Appeals (5. Fed. 2d) 615, l. c. 622) held that the acquisition of the stock of the Woodbury Company did not violate Section 7, for the reason that at the time the Woodbury Company was gradually getting out of business and that "indeed before the transaction in question arose it had determined to do so".

With reference to that acquisition this Court said (page 560):

> "The court below held that the last named company [i.e. Woodbury Glass Company] was not in competition with petitioner within the meaning of the statute and modified the order accordingly. Therein we agree and to that extent affirm its decree."

6. While it is true, as the Court of Appeals says, that the Sherman Act and the Clayton Act provide different tests of liability (*United Shoe Machinery Co. v. United States,* 258 U. S. 451, 459), in that the latter prohibits stock acquisition, the Clayton Act does not change the meaning of the terms "substantial competition", "restraint of trade" and "monopoly".

Further, the existence of substantial competition is a necessary condition of liability under each statute, and the absence of such competition here, owing to the insolvency of the McElwain Company, renders both enactments inapplicable. On this ground we submit the decision of the Court of Appeals is in conflict with the principles laid down in cases under the Sherman Act.

The case of *American Press Association v. United States,* 245 Fed. 91, was decided by the Court of Ap-

peals for the Seventh Circuit. The situation was this. In 1912 the Government brought suit against the American Press Association, the Western Newspaper Union and others under the Sherman Anti-Trust Act and obtained a decree by which the Western Newspaper Union was permanently enjoined from combining with the American Press Association "either by purchase, stock ownership or in any other manner".

But circumstances greatly changed. In 1917 the American Press Association was conducting its business at a loss of over $3000 per month and was practically bankrupt. It petitioned the District Court for permission to sell the property as a going concern to the Western Newspaper Union. The District Court denied the petition. The Court of Appeals reversed the decision of the District Court and in the course of its opinion said (page 93):

> "The American Company is forced to go out of the plate business. No decree can stop that. And after the American Company quits, if the Western is left alone in the field, the ultimate situation of the country newspapers would be the same whether the plant be scrapped or sold as an integer. Neither the decree, nor in our judgment, the Sherman law prevents the Western from buying the scraps piecemeal. If it did buy, it could organize them anew. If permitted to buy the integer, it would save the expense of reorganization. If the plant be scrapped two injuries result; one to the public from the destruction of a usable and useful plant; the other to the stockholders of the American Company."

In the case of *United States v. United States Steel Corporation*, 251 U. S. 417, the Court had before it as one phase the purchase by the defendant of the Tennessee Coal and Iron Company. Concerning this acquisition the Court said (pages 446-7):

"There is, however, an important circumstance in connection with that (i.e. acquisition) of the Tennessee Company which is worthy to be noted. It was submitted to President Roosevelt and he gave it his approval. His approval, of course, did not make it legal, but it gives assurance of its legality, and we know from his earnestness in the public welfare he would have approved of nothing that had even a tendency to its detriment. And he testified he was not deceived and that he believed that 'the Tennessee Coal and Iron people had a property which was almost worthless in their hands, nearly worthless to them, nearly worthless to the communities in which it was situated, and entirely worthless to any financial institution that had the securities the minute that any panic came, and that the only way to give value to it was to put it in the hands of people whose possession of it would be a guaranty that there was value to it.' Such being the emergency, it seems like an extreme accusation to say that the corporation which relieved it, and, perhaps, rescued the company and the communities dependent upon it from disaster, was urged by unworthy motives. Did the illegality attach afterwards and how? And what was the corporation to do with the property? Let it decay in desuetude, or develop its capabilities and resources? In the development, of course, there would be profit to the corporation, but there would be profit as well to the world. For this reason President Roosevelt sanctioned the purchase and *it would seem a distempered view of purchase and result to regard them as violations of law.*" (Italics ours.)

7. Conclusion.

From first to last there is nothing in the procedure and in the consequences of the transaction that invites the denunciation of the law. We submit if this were a proceeding under the Sherman Act, there is no step in the dealings between the parties that would be

challenged by any provision of that act as construed by this Court.

The sole question therefore turns upon the particular provision of Section 7 of the Clayton Act. Broadly speaking, there may be a vague competition between all the 1500 concerns engaged in making shoes. To guard against so attenuated a test, the statute requires that only a substantial lessening of competition shall be ground for complaint. We submit that essential competition cannot be based upon the circumstance that at some remote points the trade of the two concerns came in contact, involving nothing more than a negligible number of pairs of shoes. Furthermore, the condition of the McElwain Company was such as to preclude the possibility of any competition then or thereafter.

In all respects the transaction itself was fair, open, without the suggestion of oppression or sinister purpose. So much is admitted by counsel for the Commission (R. 131-2).

Apart from the question of competition, a transaction otherwise not subject to challenge, is attacked solely because the assets were acquired by a purchase of shares. It is true that in this respect the Clayton Act presents a question that would not arise under the Sherman Act. The decisions of this Court make it clear that the mere purchase of shares does not constitute an offense. It is the ultimate purpose and effect that controls.

This Court has said that where the purchase of shares has been followed by the acquisition of title to the assets before the Commission moves, there is no more ground for complaint, regardless of the question of competition. As a means of approach to securing title to assets, the purchase of shares is not improper. In this case it is true, technically the title to

assets was not obtained until after the complaint was filed; and strictly speaking, such a case has not been passed upon by this Court. But it is also true that in this case the assets of the McElwain Company had been absorbed and, to all intents and purposes, used by petitioner as owner. The two properties were amalgamated and openly used as one for two years before the complaint was filed. Holders of 50 shares of preferred and 35 shares of common stock held out, and the formality of passing technical title and the admitted purpose to dissolve the corporation had been delayed. So soon as complaint was made, the technical omission was corrected. The one evil complained of was cured; in the only way in which this could at that stage be done.

Much is made in the record of the manner in which the sale of assets was effected. We respectfully submit that this discussion serves no practical purpose. If the company had the right to sell, the method adopted does not touch the merits of the transaction.

Should this Court hold that the technical transfer came too late to defeat the complaint, there is still the question of the relief to be ordered. The Commission's order, effective May 7, 1927, (six years after the transaction) calls upon petitioner "to divest itself of the stock of the McElwain Company, and to cease and desist from the ownership, operation and management of the properties formerly owned by the McElwain Company."

It is respectfully submitted that this order is incapable of performance. There is no stock and there are no takers. So much is obvious. Petitioner would be the only purchaser. The order to desist from the ownership and management of the properties is futile. If petitioner is the owner (and this the order presupposes) then the general purpose and the technical re-

quirements of the law have been met. If the order contemplates (what it does not say) a re-sale of the properties, then it can accomplish nothing of practical value, for the obvious reason that they would have to be offered subject to the debts which petitioner now controls. A re-instatement of the situation, it is submitted, embraces debts as well as properties. It stands to reason that purchasers who desisted in the beginning would be more reluctant now to assume such obligations. The financial embarrassment of the concern must deter any outside investor from engaging in it, only a going concern in immediate and pecular need of the facilities offered, and prepared to pay correspondingly for them what no one else could be induced to give, would consider the proposition. This is the sole explanation for the prompt purchase by petitioner at a price that advantageously salvaged the properties for all concerned, instead of waiting to take them at ruinous figures after the inevitable crash. It must be apparent that at any sale the petitioner would be the only bidder. The result would be that the title which it now holds would be confirmed. It would be an empty performance.

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Appendix.

1. Section 7 of the Clayton Anti-Trust Act (paragraphs 1 and 3):

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."
>
> "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

2. The Bankruptcy Act Definition of Insolvency (Title 11, U. S. C., Sec. 1 (15), page 243):

> "a person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to hinder, defraud or delay his creditors, shall not at a fair valuation, be sufficient in amount to pay his debts;"